IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS ADMIRALTY & VICE ADMIRALTY JURISDICTION

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ADMIRALTY SUIT NO.3 OF 1999

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Hindustan Petroleum Corporation
Limited, a Government of India
Enterprises. ...Plaintiff

v/s.

1.M.V. Jagprayog
2.The Great Eastern Shipping
Co.Ltd. ...Defendants

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Mr.V.C.Kotwal with Mr.M.D.Siodia and Ms.Phalguni Thakkar i/b Ruastomji & Ginwala for the Plaintiff.

Mr.S.K.Mukharjee with Mr.Anil Menon for the Defendants.

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CORAM: D.K.DESHMUKH, J.

DATED: 5TH SEPTEMBER,2006

JUDGMENT:

1. The Plaintiff is a company incorporated under the Companies Act and is a Government of India undertaking. The first Defendant is a Motor Vessel flying Indian Flag and registered in India. The 2nd Defendant is also a company incorporated under the Companies Act and is the owner of the Defendant No.1-vessel. According to averments in the plaint, the Plaintiff is the owner of Virtual Jetty at Kandla in the State of Gujarat, which was built by the Plaintiff and commissioned on 3-6-1996 at the cost of approximately Rs.19 crores. The Kandla Port Trust informed the Plaintiff's manager that the first Defendant vessel would berth at the Plaintiff's Virtual Jetty on 20-10-1996. The first Defendant vessel with a Pilot on board approached the Virtual Jetty on 20-10-1996. The Plaintiff's officers

arrived at the Virtual Jetty to monitor the berthing and subsequent pumping operation. According to the Plaintiff, when the first Defendant vessel approached the Virtual Jetty, due to negligence of the Master of the first Defendant vessel, the Virtual Jetty owned by the Plaintiff suffered damages. According to the Plaintiff, it has carried out temporary repairs to the Virtual Jetty at the costs of Rs.38,97,000/-. Apart from that the Plaintiff has also suffered loss of profit of Rs.1,27,00,000/- due to idling of the Virtual Jetty. According to the Plaintiff, it also paid demurrage to the tune of Rs.1 crore. Thus, according to the Plaintiff it is entitled to recover an amount of Rs.2,65,97,000/-. The Plaintiff in this suit is claiming a decree against the Defendant in that amount with interest.

2. The suit is resisted by the Defendants. Firstly, the Defendants deny that this court has the jurisdiction to entertain the suit. The Defendants also deny that the Plaintiff is the owner of the Virtual Jetty. The Defendants also deny that the Virtual Jetty of the Plaintiff was damaged due to collision with the first Defendant-vessel. They also deny that the collision was due to any negligence on

the part of the Master of the first Defendant.

3. This Court by order dated 30th March, 2000 has framed the following issues:-

I S S U E S

1. Whether the Court has jurisdiction to entertain and try the suit for the reasons stated in paragraph 1 of the Written Statement?

2. Whether the accident occurred without the actual fault and privity of the Defendants, as stated in paragraph 2 of the Written Statement?

3. If the answer to Issue No.2 be in the affirmative, whether the Defendants are entitled to limit their liability under the provisions of the Merchant Shipping Act, 1958, and if so, in what sum?

4. Whether the Plaintiff is the owner of the said virtual jetty at the Port of Kandla, as

alleged in paragraphs 2 and 3 of the Plaint?

5. Whether the Defendants prove that there had been an abrotive mooring attempt on the part of the said vessel undertaken in the manner as alleged in paragraph 6 of the written statement?

6. Whether the Plaintiff proves that the collision occurred as a consequence of the negligence and default of the 2nd Defendant as alleged in para 4 of the Plaint?

7. Whether the Defendants prove that the Plaintiff as the Occupier of the said Virtual Jetty had held itself out to all invitees such as the Defendants to berth in and discharge cargo, as alleged in paragraph 12 of the Written Statement?

8. If the answer to the preceding issue is in the affirmative, whether the Defendants prove that Plaintiff must be held to have warranted the safety of the said jetty?

9. Whether the Defendants prove that said Virtual Jetty was unsafe to enter, maneuver in and berth for any of the reasons alleged in paragraph 12 of the Written Statement?

10. Whether the Plaintiff has repaired the virtual jetty in the manner alleged in paragraph 7 of the plaint and, if so, what cost has it incurred?

11. Whether the Defendants prove contributory negligence on the part of the Plaintiffs and/or their servants and/or agents?

12. Whether the losses alleged in paragraph 7 of the Plaint were the direct and/or foreseeable consequence of the aid collision and are recoverable from the Defendants?

13. Whether the Plaintiff has a maritime loan against the 1st Defendant-vessel as alleged in paragraph 13 of the Plaint?

14. Whether the Defendants are liable to pay to the Plaintiffs the sum of Rs.2,77,81,528/-

together with interest at 18% p.a. as claimed in the Plaint?

15. Whether the Plaintiff is entitled to proceed against the Defendant vessel under the provisions of Section 443 or 444 of the Merchant Shipping Act, 1958 as alleged in paragraph 13 of the Plaint?

16. To what relief, if any, is the Plaintiff entitled?

17. What order?

4. Perusal of the above quoted issues framed by this Court shows that out of the issues framed by the court, two issues are most important. First issues is about the jurisdiction of this court to entertain the suit and the second issue is about the ownership of the Virtual Jetty of the Plaintiff. Because in the plaint, the Plaintiff is claiming compensation for the damage caused to the Virtual Jetty on the footing that the Plaintiff is owner of the Virtual jetty. The Plaintiff has not taken any alternate plea in that regard. Therefore, I propose to take up

issues Nos. 1 & 4 for consideration first.

ISSUES NOS.1 & 4

(1. Whether the Court has jurisdiction to entertain and try the suit for the reasons stated in paragraph 1 of the Written Statement?

4. Whether the Plaintiff is the owner of the said virtual jetty at the Port of Kandla, as alleged in paragraphs 2 and 3 of the Plaint?)

5. So far as issue No.1 is concerned, according to the Defendants this court does not have the jurisdiction to entertain the present suit in its admiralty jurisdiction , because the first Defendant-vessel was lying at the Port of Kandla at the institution of the suit, which is outside the admiralty jurisdiction of this court and therefore, this court does not have the jurisdiction to entertain the suit. The learned single Judge of this Court by judgment in Notice of Motion No.1153 of 1998 in Adm.Suit No.33 of 1997 had taken a view that the jurisdiction in admiralty of this court for an action in rem or in personam can be exercised only against

the vessel which is in the territorial jurisdiction of this court and in that case as the vessel was anchored at Kandla Port , as in this case, which is situated in the State of Gujarat, this court does not have the jurisdiction to entertain the suit. That judgment was challenged in Appeal before the Appeal bench of this Court. The Appeal bench by its judgment in the case of **Kamla Kant Dube & Anr. v/s. m.v. "Umang" & Ors. 2002 (Supp.2) Bom.C.R. 864** has set aside the judgment of the learned single Judge and has taken a view that though on the date of institution of the suit the vessel was at Kandla Port, a civil suit for arrest of that vessel can be instituted in this court in its admiralty jurisdiction. In view of the judgment of the Division Bench, it has to be held that this court has the jursidcition to entertain this suit. Issue No.1 is, therefore, answered in favour of the Plaintiff and against the Defendants. It is held that this court has the jurisdiction to entertain the suit.

6. So far as issue No.4 is concerned, necessary pleadings are to be found in paragraph 3(a) of the Plaint. They read as under:-

> "3(a) The Plaintiffs are the owners of a Virtual Jetty at Kandla in the State of Gujarat which was built by them and commissioned on 3-6-1996 at a cost of approximately Rs.19 crores."

7. In paragraph 12, the Plaintiff states that it has a right in rem against the 1st Defendant Vessel and right in personam against the 2nd Defendant for the loss and damage suffered by the Plaintiff due to collision of the first Defendant vessel with the Plaintiff's Virtual Jetty.

8. In the Written statement in paragraph (5), the Defendants state thus:-

> "With reference to paragraph 3(a), it is denied that the Plaintiff is the owner of the said Virtual Jetty at the Port of Kandla. To the best of the Defendant's knowledge, while the Plaintiffs are occupiers of the said virtual jetty, the ownership of the said virtual jetty lies with the Board of Trustees of the Port of Kandla."

9. By averments in paragraph 18, the Defendants deny that the Plaintiff has any right in rem against the Defendant No.1 or right in personam against the Defendant No.2. Perusal of issue No.4 shows that the burden to prove that the Plaintiff is the owner of the Virtual jetty is clearly on the Plaintiff. So far as the documents are concerned, there is no document produced by the Plaintiff which will establish that the Plaintiff is the owner of the Virtual Jetty. The witness examined on behalf of the Plaintiff by name Mr.CH.N.R.S.H.Srinivas has stated in his cross-examination that the approach jetty is a part of the virtual jetty. He has also stated that the approach jetty was on the land, whereas the virtual jetty was in the sea. Thus, the virtual jetty and the approach jetty will be part of the same scheme and both are permanently fastened to earth. The term "immoveable property" is defined by Section 3(26) of the General Clauses Act to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth, and thus the approach jetty and the virtual jetty will be immoveable property and therefore, to establish their ownership it was for the Plaintiff to produce the document of title. The

Plaintiff has not produced any document of title. On behalf of the Plaintiff reliance was placed on a letter dated 18th October, 1995 addressed to the Dy.General Manager of the Plaintiff by the Chief Engineer of the Kandla Port Trust. Subject of the letter was construction of virtual jetty for the Plaintiff at Kandla. This letter is with reference to two letters, one dated 16-9-1995 and other dated 12-10-1995. All that is stated in these letters is that with reference to the abovesaid two letters modifications are made in the construction of virtual jetty which are mentioned in this letter. Firstly, it is difficult to understand this letter without reading the letters with reference to which these letters have been written and all that these letters show is that the Plaintiff was to go ahead with the construction of approach trestle of the virtual jetty in consultation with Kandla Port Trust. This letter does not establish that the Plaintiff is the owner of the Jetty. The second letter is dated 6th October, 1995 addressed by Government of India to the Chief Engineer of Kandla Port Trust. This is about location of the virtual jetty. So far as the Plaintiff is concerned, only a copy of this letter is forwarded to the Plaintiff. This letter also does

not establish that the Plaintiff is the owner of the virtual jetty. The third document is the office Memorandum dated 20th May, 1996. The subject of this letter is construction of virtual jetty at Kandla Port Trust by the Plaintiff. This document also does not establish that the Plaintiff is the owner of the jetty. So far as the aspect of ownership of the virtual jetty is concerned, these are all the documents which have been produced by the Plaintiff. So far as the oral evidence is concerned, Mr.Srinivas, the witness examined on behalf of the Plaintiff states in paragraph 2 that

> "I say that the Plaintiffs are the owners of a Virtual Jetty at Kandla. I was associated with construction of HPCL's Virtual Jetty from the beginning to its commissioning during the period July, 1995 to June, 1996. The Virtual Jetty comprised of approach jetty, floating hose and spread mooring system.....
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> ...The Virtual Jetty was constructed by the Plaintiffs at its own costs amounting to about Rs.19 crores."

And the witness has produced the above referred documents which, according to the Plaintiff's witness, show that the permission was granted to the Plaintiff to construct the virtual jetty. It is further stated by this witness in paragraph 2(4) that though the Defendants have disputed that the Plaintiffs are the owners of the Virtual jetty, the Defendant No.2 in the plaint filed in this Court in Suit No.2046 of 2001 has stated thus,

"The Plaintiff (GESCO) says and submits that as occupier of the said Virtual Jetty and/or as owners thereof, the Defendant (HPCL) was duty bound firstly to maintain the jetty to ensure safety of any vessel invited to and or utilizing the said jetty".

10. According to the witness, therefore, the Defendants have admitted that the Plaintiffs are the owners of the virtual jetty. This witness has been cross-examined on this aspect of the matter. The answers given by this witness to questions Nos. 30 to 38 are relevant. They read as under:-

Q.30. Was there any written document between

KPT and the Plaintiff dealing with the terms and conditions under which or pursuant to which the Virtual Jetty would be constructed at Kandla?

Ans: I do not remember.

Q.31. Was there any written document laying down who would bear the cost of Construction of the Virtual Jetty at Kandla?

Ans: There was extensive correspondence between KPT, the Plaintiff and the Oil Co-ordination Committee based on which the Plaintiff agreed to bear the cost of Construction.

Q.32. Is there any written document in which provision is made as to the party in whom the ownership of the Virtual Jetty would vest once it was constructed?

Ans: As far as I remember there was a Draft Agreement between KPT and the Plaintiff. Under the Draft Agreement the Plaintiff was to

make an annual payment to KPT, I am not sure whether this Agreement was finally signed. I remember that during my tenure at Kandla the Plaintiff made payment of approximatelty Rs.1 crore to KPT as an annual charge.

Q.33. (Shown the Affidavits of Documents dated 31st July, 2000 and 15th July, 2002, both filed by the Plaintiff). Were you consulted when these Affidavits were prepared?

Ans: No.

Q.34. Is there any reference in these Affidavits to the Draft Agreement which you have just mentioned?

Ans: I do not find any such reference.

Q.35. Is the approach Jetty part of the Virtual Jetty?

Ans: Yes.

Q.36. Is there any Official Map indicating

that the approach Jetty stood in the ownership of the Plaintiff?

Ans: The Virtual Jetty Project consists of the Spread Mooring System, the approach trestle/jetty and the Pipeline for receiving the products discharged from ship moored at the Jetty. The entire facility was constructed by the Plaintiff at a cost of approximately Rs.19 crores.

Q.37. I repeat my question: Is there any Official Map indicating that the approach Jetty stood in the ownership of the Plaintiff?

Ans: I repeat the answer given by me to the previous question. I wish to add that the Plaintiff took various approvals from KPT before erection of the facilities referred to above.

Q.38. According to you these documents issued by the KPT would be relevant to show that the ownership of the Virtual Jetty lay in the Plaintiff?

Ans: I do not think so.

11. It is clear from the above quoted answers given by this witness of the Plaintiff that according to him the document proving ownership of the Plaintiff of the virtual jetty would be the draft agreement between the Plaintiff and the Kandla Port Trust. But this witness is not sure whether that agreement has been finally signed. This witness admits that the letter by which various permissions were granted by the Kandla Port Trust for construction of the virtual jetty will not establish the ownership of the Plaintiff of the virtual jetty. Thus, it is clear that neither there is any documentary evidence nor any oral evidence to show that the Plaintiff was the owner of the virtual jetty.

12. Now, so far as the statement made by the witness of the Plaintiff that because of the statement made in the plaint filed in this court by the Defendant No.2, it becomes an admitted position between the parties that the Plaintiff is the owner of the virtual jetty, is concerned, it is clear from the

statement quoted above that the Defendant No.2 does not say in clear terms that the Plaintiff is the owner of the virtual jetty. What the Defendant No.2 says is that the Plaintiff is either the occupier or the owner of the virtual jetty. In this background, therefore, in my opinion, the learned Counsel appearing for the Defendant rightly relied on a judgment of the Supreme Court in the case of **Chikkam Koteswara Rao v/s. Chikkam Subbarai and ors., AIR 1971 SC 1542**. The observations made by the Supreme Court in paragraph 3 of that judgment are relevant. Paragraph 3 reads as under:-

> 3. It is clear from the judgment of the High Court that but for the aforementioned statement of the appellant, the High Court would not have disturbed the finding of the trial court as regards the properties covered by Exh.B-6. Before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. There should be no doubt or ambiguity about the alleged admission. There is no difference in the

nature of the acquisitions made under Exhs. B-2 to B-5 and B-7 and that made under Exh.B-6. They were all made during the life time of Reddinaidu.

13. It is clear from the observations of the Supreme Court quoted above that in order that an admission can be used against a person making it to defeat his right, the admission should be clear and unambiguous. From the statement attributed to the Defendant No.2, it is clear that the Defendant No.2 does not in clear terms admit that the Plaintiff is the owner of the jetty. The Defendant No.2 states that the Plaintiff is either the owner of the jetty or the occupier of the jetty. In so far as the written statement filed in the present case is concerned, the Defendant has in clear terms denied that the Plaintiff is the owner of the virtual jetty. He has stated that according to the knowledge of the Defendant, the Plaintiff is the occupier of the virtual jetty. In my opinion, therefore, merely on the basis of the statement made in the plaint filed by the Defendant No.2 a finding cannot be recorded that the Plaintiff has proved that the Plaintiff is the owner of the virtual jetty. The learned Counsel appearing for the Plaintiff tried to

submit that even assuming that the Plaintiff is the occupier of the jetty, still it will be entitled to be compensated for the damage caused to the virtual jetty.

14. This submission was strongly opposed by the Defendants and in my opinion rightly. Because the Plaintiff has come to the court with a clear case that the Plaintiff is the owner of the jetty and it is only in that capacity that it is entitled to be compensated for the loss caused to the jetty, it cannot at this stage come with an alternate case that it is entitled to be compensated for the loss caused to the virtual jetty because they are occupier of the jetty. There are no pleadings by the Plaintiff that it is occupier. There is also no evidence either oral or documentary to show that the Plaintiff was the occupier of the virtual jetty. All that has come on record is that the Plaintiff constructed the virtual jetty. What is significant to be noted is that because the virtual jetty was to be constructed in the sea, obviously, permission from the Central Government would be necessary. Because the approach jetty is to be constructed on the land belonging to the Kandla Port Authorities and this port authorities

control the operations of the port, Kandla Port Authorities will be involved. The Plaintiff itself is a company owned by the Government of India, therefore, it is obvious and it goes without saying that there must be correspondence exchanged between the parties regarding the proposal for construction of the virtual jetty, as to who will bear the costs of construction of the jetty, how that costs will be recouped, who will own the jetty, who will occupy the jetty, for how long it will be occupied. But it is clear from the record that the Plaintiff has not produced any material correspondence which must have been exchanged between the parties on record. It is clear from the deposition of the witness examined on behalf of the Plaintiff that there was a draft Memorandum prepared which spelt out rights of the parties in relation to the virtual jetty. Apart from the fact that there are no averments made in the plaint in relation to that Memorandum, no attempt has been made to produce that document. Failure of the Plaintiff to produce these documents, which obviously were in possession of the Plaintiff, creates suspicion in the mind of the court about the case of the Plaintiff and the failure of the Plaintiff to produce the relevant documents which were available

with it may make them liable for adverse inference that if they had produced the documents, they would have gone against the case of the Plaintiff.

15. Taking overall view of the matter, therefore, in my opinion, it cannot be said that the Plaintiffs have succeeded in establishing that the Plaintiff is the owner of the virtual jetty and therefore the issue No.4 is answered against the Plaintiff.

16. As I find that the Plaintiff has failed to prove that it is the owner of the virtual jetty and as the Plaintiff is claiming compensation only in its capacity as the owner of the virtual jetty, in my opinion, it is not necessary to answer all other issues which have been framed by this Court.

17. In the result, therefore, the suit of the Plaintiff fails and is dismissed. The Plaintiff is directed to pay costs of this suit to the Defendants, as incurred by the Defendants.

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